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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the district court err in failing to enjoin elections for certain state court judgeships held pursuant to voting changes to which the United States Attorney General had objected under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c?

2. Is the failure to preclear voting changes under Section 5 automatically cured by the later preclearance of other voting changes in the same election district?

3. What relief should be ordered by this Court in a situation where the federal district court has improperly permitted elections to occur pursuant to voting changes to which the Attorney General has objected under Section 5?

PARTIES

The parties in the court below are as follows:

Plaintiffs: Janice G. Clark, Orscini L. Beard, Eddie G. Crawford, Norbert C. Rayford, Voter Information Project, Inc., Louis Scott, Sylvia Cooks, Connie Sadler, Lloyd Dangerfield, Tom Nelson, Albert Richard, Brenda Ford, Edward Larvadain, and Josie Frank, on behalf of themselves and all others similarly situated.

Plaintiff-Intervenor: The New Orleans Chapter of the Louis A. Martinet Society.

Defendants: Charles "Buddy" Roemer, in his capacity as Governor of Louisiana; Fox McKeithen, in his capacity as Secretary of State of Louisiana; and William Guste, in his capacity as Attorney General of Louisiana.

Defendants-Intervenors: The Louisiana District Judges Association and the Orleans Parish Trial Judges Association.

The plaintiffs in the court below are appellants in this Court. The defendants and defendant-intervenors in the court below are appellees in this Court.

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CHARLES "BUDDY" ROEMER, *et al.*,

Appellees,

On Appeal from the United States District Court for the Middle District of Louisiana

JURISDICTIONAL STATEMENT

The appellants are black registered voters and a voting rights organization in the State of Louisiana, and they are plaintiffs in the district court below. They appeal from orders of the three-judge court of the United States District Court for the Middle District of Louisiana dated October 22, 1990 and October 31, 1990, refusing to enjoin elections for certain state court judgeships held pursuant to voting changes that are the subject of objections by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. On November 2, 1990, this Court granted in part an application for injunction pending appeal regarding those elections, stating that the injunction is "conditioned upon the timely docketing of a statement as to jurisdiction in the above-entitled appeal." *Clark v. Roemer*, 59 U.S.L.W. 3360-3361, No. A-327 (Nov. 2, 1990, as modified Nov. 5, 1990).

OPINIONS BELOW

The order and opinion of the three-judge district court dated October 31, 1990 is unpublished and is reproduced in the accompanying appendix, J.S. App. 1a. All other orders of the three-judge district court are also unpublished and are reproduced in the appendix as follows: October 24, 1990 order (J.S. App. 57a); October 22, 1990 order (J.S. App. 68a); October 2, 1990 order (J.S. App. 85a); September 28, 1990 order (J.S. App. 90a); September 27, 1988 order (J.S. App. 98a); August 26, 1988 order (J.S. App. 103a). In addition, an October 2, 1990 order of the single-judge district court is included for reference in the appendix, J.S. App. 81a.

JURISDICTION

The district court's order denying the requested injunctive relief was entered on October 22, 1990, and was modified on October 31, 1990. A notice of appeal from the October 22 order was filed on October 26, 1990. (J.S. App. 188a). A supplemental notice of appeal from the October 22 order and the October 31 modification was filed on November 6, 1990. (*Id.* at 190a). This Court has jurisdiction of this appeal from the denial of injunctive relief by a three-judge district court under 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c (repeated verbatim in the appendix, J.S. App. 193a).

STATEMENT OF THE CASE

Over the past twenty-five years, the State of Louisiana has made a number of changes in its laws regarding judicial elections, including the creation of many new elected judgeships. Some of the voting changes were submitted for Section 5 preclearance shortly after enactment while others were not. Nevertheless, the State proceeded to implement all of the changes, even those for which preclearance never was obtained. As a result, the State's judiciary now includes a combination of precleared and unprecleared judgeships, and even

within specific judicial districts some of the judgeships are precleared and others are not.

This litigation involves a challenge brought in 1986 under Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973, and the Fourteenth and Fifteenth Amendments to the use of at-large voting in mostly majority white multi-member election districts for state trial and intermediate appellate court judges in Louisiana. As initially filed, the case also raised a claim regarding a few unprecleared voting changes under Section 5 of the Act. Jurisdiction of the entire case was based on 28 U.S.C. Sections 1331 and 1343 (3) and (4), and 42 U.S.C. Sections 1973, 1973c, and 1983. On July 30, 1987, an amended complaint was filed adding a challenge under Section 5 to a larger number of unprecleared changes involving the Louisiana trial courts (known as the district courts) and the intermediate appellate courts (known as the courts of appeal), and going back over a period of twenty years. The Section 5 claims were assigned to a three-judge court under 42 U.S.C. Section 1973c.[1]

After the filing of the amended complaint, the State submitted the unprecleared changes to the United States Attorney General for clearance. In letters dated September 23, 1988 (J.S. App. 108a) and May 12, 1989 (*id.* at 127a), the Attorney General objected under Section 5 to many of the changes, including the creation of some 47 judgeships elected through at-large voting with designated posts and a majority vote requirement. In the meantime, on September 27, 1988, the three-judge court enjoined the impending fall, 1988 elections for the four uncleared judgeships scheduled to be elected at that time. (*Id.* at 98a).

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[1] The present appeal involves only the Section 5 issues. Recently, the single judge district court dismissed the Section 2 claims because of the Fifth Circuit's September 28, 1990 decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), holding Section 2 inapplicable to the election of judges. The single judge district court here had found Section 2 liability in a number of districts, *Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988), and was about to impose a remedy when *LULAC* was decided. The district court's resulting dismissal is the subject of a petition filed by the plaintiffs in this Court seeking a writ of certiorari before judgment in the Court of Appeals. *Clark v. Roemer*, No. 90-898. As noted in that petition, one of the reasons for granting certiorari before judgment is to allow the Section 2 issue to be heard along with the Section 5 issues raised in this appeal. Pet. Cert. at 14.

Despite the Attorney General's objection letters and despite the September, 1988 injunction from the district court, the State made no attempt to seek preclearance in the United States District Court for the District of Columbia. Instead, the State proceeded with plans to hold the fall, 1990 elections for both cleared *and uncleared* judgeships. (1990 is the regular election year for all of the state's existing 178 district court judgeships and 22 of the existing 48 court of appeal judgeships, as well as several new and previously unfilled judgeships). Shortly after learning of this, the plaintiffs filed on July 23, 1990 a motion asking the three-judge district court to enjoin the elections involving uncleared voting changes.

While that motion was pending, the Attorney General on September 17, 1990 sent letters to the State withdrawing his objection to eleven judgeships in Orleans Parish, (J.S. App. 136a), but refusing to withdraw the rest of the objections, saying the State had not carried its burden of proving the absence of a racially discriminatory purpose in creating and maintaining the voting changes encompassed by those objections. (*Id.* at 142a). He also objected to four new judgeships created since the issuance of the earlier objection letters. (*Id.*).

The United States entered an appearance in the district court and filed a memorandum *amicus curiae* supporting the plaintiffs' motion for an injunction. On September 28, 1990, a hearing was held at the conclusion of which the three-judge court entered an interim order that permitted the regularly scheduled primary elections on October 6 and the runoff on November 6 to proceed for the time being, but enjoined the winning candidates for any uncleared judgeships from taking office. (J.S. App. 90a). The three-judge court later said it permitted the elections to proceed in this provisional manner because it was uncertain about the applicability of Section 5. (*Id.* at 32a). The court also asked for further briefing on the issues.

Also on September 28, the Fifth Circuit sitting en banc released its decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), holding that Section 2 of the Act does not apply to judicial elections. Accordingly, on October 2, 1990, the single judge hearing the Section 2 claims lifted an injunction he previously had issued against elections under the existing at-large system in eleven judicial districts where he found a Section 2 violation. In the wake of lifting

the injunction, he also ordered that elections in those districts proceed under an accelerated special election schedule, with qualification to occur October 3-5, the first primary on November 6, and the runoff on December 8. (J.S. App. 81a). Given that the Attorney General had objected to some of the judgeships in those eleven districts, the three-judge court issued a separate order on October 2 stating that the elections for those uncleared judgeships would go forward on the same special election schedule, but the winners would be enjoined from taking office. (J.S. App. 85a).

On October 9, 1990, the Attorney General sent another letter to the State saying the previously interposed Section 5 objections would not be withdrawn despite the Fifth Circuit's decision in *LULAC*. (J.S. App. 168a).

After further briefing, the three-judge court held a hearing on October 18, 1990. On October 22, the court issued an order that denied the injunctive relief requested by the applicants and permitted the elections to proceed and the winners to take office. (J.S. App. 68a). That order was followed by an October 31 opinion explaining the rationale for the October 22 order and modifying it slightly with respect to one judgeship (which is discussed in n. 2 below). (*Id.* at 1a).

In the October 22 order and the October 31 opinion, the three-judge court held there was no need for clearance of a large number of the changes to which the Attorney General objected because subsequent voting changes in the same judicial districts had been submitted and precleared. For example, said the court, the preclearance of the creation of a seventh at-large judgeship in a district would necessarily preclear the creation of at-large judgeships in the previous six. (J.S. App. 25a). Thus, even though one or more of the previous six may not have been submitted until after preclearance of the seventh, and even though the Attorney General objected once the earlier judgeships were submitted, the district court held the Attorney General's objections to be invalid. The court said:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number

of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

(J.S. App. 27a - 28a).[2]

Most of the situations in which the district court applied this rule involved the creation of at-large judgeships in districts where subsequently created at-large judgeships were submitted and precleared. However, the district court also included within the sweep of its rule (1) an uncleared act creating designated divisions (or posts) within the First Circuit, which the district court said was precleared by the approval of a later act adding numbered posts to the other circuits, (*id.* at 52a, n. 74);[3] (2) an uncleared act creating at-large circuitwide judgeships in the Second and Third Circuits, which the district court said was precleared by approval of a later act adding judgeships to be elected from smaller districts within those circuits;[4] (3) the uncleared split of the 10th judicial district and the resulting creation of the 39th, about which only the underlying referendum proposing the split had been precleared;[5] and (4) the uncleared division B judgeship in the 20th district, about which the only preclearance was of a referendum

[2] The judgeships that the district court held to have been precleared under this reasoning are listed in Part I of the October 22 order (J.S. App. 70a - 71a). In addition, on October 31, the district court also held that Division B of the 20th district was precleared in this manner. (*Id.* at 53a). It should be noted here that the district court need not have listed in Part I of its October 22 order the judgeships of the 17th and 32nd judicial districts. The plaintiffs are unaware of any failure to obtain preclearance of those judgeships and never have sought any injunction against them. The district court has been informed of the plaintiffs' position on this. Other than the judgeships from the 17th and the 32nd, all of the judgeships listed in Part I of the October 22 order as well as Division B of the 20th district have been the subject of an objection by the Attorney General. (*Id.* at 121a - 126a).

[3] The Attorney General's September 23, 1988 letter specifically objected to the act creating designated divisions in the First Circuit. (J.S. App. 126a).

[4] See exhibit D-6 to the September 28, 1990 hearing as well as J.S. App. 51a - 52a. The Attorney General objected on September 23, 1988 to the circuitwide judgeships. (*Id.* at 126a).

[5] See exhibit D-1 to the September 28 hearing. The Attorney General objected to the split on September 23, 1988. (J.S. App. 122a).

proposing allocation of the uncleared division B to a proposed new district that never was created because the referendum failed.[6]

Thus, the district court's decision had the effect of invalidating a number of the Attorney General's objections and clearing several voting changes because of the approval of related or subsequent changes in the same judicial districts.

With respect to uncleared judgeships in districts where no other seats subsequently were created or precleared, the district court held that the failure to obtain clearance of those judgeships violated Section 5.[7] Despite the absence of clearance, however, the district court said elections for those same judgeships could proceed as scheduled, with the winners being permitted to take office and serve "provisionally." The district court gave the State ninety days to file a declaratory judgment action seeking clearance in the District of Columbia (or to persuade the Attorney General to reconsider and grant clearance), with the winning candidates remaining in office during the course of the litigation in the District of Columbia. If the State loses, said the district court, those judges will continue in office for 150 days "after the finality of judgment in that case." Should the State fail to file the declaratory judgment action within ninety days (or fail to obtain clearance through reconsideration by the Attorney General), the judges elected can serve for another 150 days according to the district court's order. If the State prevails in the District of Columbia, the judges may serve their full terms. (J.S. App. 74a - 77a).

On October 29, 1990, the plaintiffs filed an application for injunction pending appeal in this Court. The application was granted in part on November 2, 1990, and the Court enjoined the November 6 and December 8 elections for those seats that the district court said

[6] See exhibit D-4 to the September 28 hearing. The Attorney General on September 23, 1988 objected to this judgeship. (J.S. App. 123a).

[7] Those judgeships are listed in Part II of the district court's October 22 order (J.S. App. 72a - 73a). However, the district court mistakenly included Division D of the 34th district, which has in fact been precleared as acknowledged by this Court's November 5 modification of the November 2 injunction pending appeal. 59 U.S.L.W. at 3362. In addition, Division B of the 6th District has since been precleared by the Attorney General on November 20, 1990. (J.S. App. 184a). All of the other judgeships listed in Part II are the subject of the Attorney General's Section 5 objections. (J.S. App. 121a - 125a, 132a, 166a - 167a, 180a).

were uncleared. This Court conditioned the injunction upon the timely filing of a jurisdictional statement appealing the district court's orders. *Clark v. Roemer*, 59 U.S.L.W. at 3361-3362.

THE QUESTIONS ARE SUBSTANTIAL

Section 5 provides that any voting change in a covered jurisdiction such as the State of Louisiana may not be implemented until the jurisdiction obtains preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia stating that the change has no discriminatory purpose or effect. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982).The questions in this case relate to the duty of a federal district court to enforce Section 5 once a State attempts to implement voting changes to which the Attorney General has interposed an objection. This Court has granted probable jurisdiction in similar cases and reversed district courts that have failed adequately to enforce Section 5. *See, e.g., NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Blanding v. Dubose*, 454 U.S. 393 (1982); *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977); *Connor v. Waller*, 421 U.S. 656 (1975). The Court should do the same here.[8]

This portion of the jurisdictional statement first will discuss the district court's failure to enjoin elections for those judgeships about which it conceded Section 5 clearance is necessary and has not been obtained. Second, it will discuss the district court's ruling that preclearance of subsequent voting changes automatically preclears prior changes in the same district. Third, it will describe the relief the appellants request from this Court.

[8] This Court has held that the creation of new elected judgeships is a voting change that must be precleared under Section 5. *Brooks v. Georgia State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 59 U.S.L.W. 3293, No. 90-332 (Oct. 15, 1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986).

I. THE DISTRICT COURT ERRED IN PERMITTING ELECTIONS TO GO FORWARD UNDER UNPRECLEARED VOTING CHANGES TO WHICH THE ATTORNEY GENERAL OBJECTED UNDER SECTION 5.

Section 5 is part of the Congressional effort to stop what this Court called the "insidious and pervasive evil" of racial discrimination in voting that "had been perpetuated in certain parts of our country." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

> To prevent any future circumvention of constitutional policy, Congress adopted Section 5 which provides that whenever a designated State or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims.

United States v. Board of Commissioners of Sheffield, 435 U.S. at 121.

By ordering elections to proceed even for judgeships it concedes should have been precleared and were not, the district court shifted the advantages of time and inertia back to the State of Louisiana and placed the burden of delay on the voters whom Section 5 was intended to protect. It permitted the State to implement voting changes found to be racially discriminatory by the Attorney General.[9] The fact that this Court enjoined elections pending appeal is an indication that the district court erred in failing itself to enjoin the elections.

This Court's injunction follows a number of prior injunctions issued in other cases by the Court and its individual Justices preventing elections from being held pursuant to unprecleared voting changes. *See, e.g., Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers); *Canady v. Lumberton County Board of Education*, 454 U.S. 957 (1981); *Holt v. City of Richmond*, 406 U.S. 903 (1972). This is in accord with the clear statements of the Court saying that uncleared changes are unenforceable. "No new voting practice or procedure

[9] Neither the district court nor this Court on appellate review has the authority to second-guess the Attorney General's substantive determination. *United States v. Board of Supervisors of Warren County*, 429 U.S. at 645-646.

may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object." *United States v. Board of Supervisors of Warren County*, 429 U.S. at 645. Uncleared changes "are not now and will not be effective as laws until and unless cleared pursuant to Section 5." *Connor v. Waller*, 421 U.S. at 656. "[T]he change in election procedure is subject to Section 5, and the . . . *courts may not further implement that change* until the parties comply with Section 5." *Hathorn v. Lovorn*, 457 U.S. at 270 (emphasis added).

The district court has ignored those precedents and has said the State should be allowed to enforce the changes to which the Attorney General has objected for as long as it takes to litigate to conclusion a declaratory judgment action in the District of Columbia. In effect, the district court has changed Section 5 from a statute that prohibits implementation of uncleared voting changes to a statute that permits implementation as long as litigation proceeds in the District of Columbia. No decision of this Court has ever held that uncleared elections — much less elections to which the Attorney General already has objected — may go forward simply because a declaratory judgment action might be filed and might eventually be successful. To the contrary, injunctions have issued against elections even where the submission was pending before the Attorney General and the possibility existed that preclearance would be granted within less than two months. *Lucas v. Townsend*, 486 U.S. at 1303.

Here, the Attorney General has objected, and reconfirmed his objections upon reconsideration. The only possibility of clearance is in the District of Columbia, and that litigation will take quite some time. The purpose of Section 5 would be defeated if the plaintiffs were forced to wait months or years for enforcement of the protections conferred by the Voting Rights Act.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PRECLEARANCE OF VOTING CHANGES AUTOMATICALLY PRECLEARS PRIOR VOTING CHANGES IN THE SAME JUDICIAL DISTRICT.

The district court held that a number of voting changes to which the Attorney General objected were retroactively cleared because of

the preclearance of subsequent voting changes in the same judicial districts. According to the district court:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

(J.S. App. 27a - 28a).

The district court's formulation flies directly in the face of this Court's decision in *McCain v. Lybrand*. In *McCain*, this Court unanimously held that the failure to preclear a voting change was *not* cured by subsequent preclearance of a second change even though the second change specifically reenacted the first. Indeed, the second change in *McCain* was very similar to the subsequent changes in the present case in that its function was to increase from three to five the number of seats and the number of residence districts within an existing at-large election system. 465 U.S. at 240. As Justice Stevens' opinion for six members of the Court said, "submission of a particular change does not encompass all prior changes — precleared or not — that have been made since the Act's effective date in 1964." *Id.* at 255, n.26. The opinion added:

> When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to Section 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to Section 5 preclearance.

Id. at 256. Thus, *McCain* directly refutes the district court's holding here that a preclearance by the Attorney General "not only approves the amended portion [of a statute] but necessarily approves the older, reenacted part, which forms part of the new act." (J.S. App. 27a).

The district court tried to distinguish *McCain* by pointing out that, in the present case, the subsequent acts actually precleared by the

Attorney General specified that the number of judges in a given district was being changed from one number to another (for instance, from six to seven). (J.S. App. 26a, n. 38). Of course, that in no way distinguishes *McCain*, in which the subsequent legislation actually precleared by the Attorney General clearly described the change from three to five council members. 465 U.S. at 240. The district court in the present case failed to grasp the crucial point that when an act changes the number of judges from six to seven, or the number of council members from three to five as in *McCain*, the Attorney General is called upon only to examine the evidence of discriminatory intent and impact surrounding that specific change. The Attorney General is not called upon to examine the earlier changes, such as those from from one judgeship to two, two to three, three to four, four to five, or five to six.

As this Court said in *McCain*, "the preclearance procedures mandated by Section 5 of the Voting Rights Act focus entirely on *changes* in election practices" that are submitted to the Attorney General. 465 U.S. at 251 (emphasis in original). The submission of subsequent voting changes cannot be deemed a submission of prior uncleared changes, according to *McCain*, if the submitting authority fails to point out that the prior changes also are uncleared and are being submitted. *Id.* at 256-257. Here, the State of Louisiana never informed the Attorney General of the prior uncleared changes.

This Court in *McCain* also said deference should be given to the Justice Department when it determines that its preclearance of later legislation did not preclear earlier legislation. *Id.* at 255-256. Here the Justice Department's Section 5 objections and its *amicus curiae* position in this litigation demonstrate that the Attorney General did not and does not intend for the preclearances of later legislation creating judgeships in Louisiana to have encompassed earlier voting changes in the same judicial districts. Nevertheless, the district court here substituted its judgment for that of the Attorney General in holding that the later preclearances incorporated the earlier changes.

The district court's decision also conflicts with this Court's affirmance of *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). In *Haith*, a 1967 North Carolina act (Chapter 997) had added one judgeship to each of

four judicial districts and had not been precleared. 618 F.Supp. at 412. The State defendants there claimed those same judgeships had also been included in later legislative enactments that were in fact precleared. *Id.* The district court in *Haith*, citing *McCain v. Lybrand*, said the later preclearance made no difference and enjoined elections for the judgeships in question. *Id.* at 413-414. The issue of the subsequent preclearance was raised by the State defendants in their jurisdictional statement in that case (no. 85-1066, J.S. at 20-21), yet this Court affirmed the lower court without opinion. 477 U.S. 901 (1986).

If the reasoning of the district court in the present case were allowed to stand, potentially discriminatory voting changes would go unreviewed and uncorrected, and the Congressional purpose behind Section 5 would be thwarted. Take, for example, the district court's statement that the preclearance of the creation of a seventh judgeship in a judicial district would necessarily approve the previous six. (J.S. App. 25a). A covered jurisdiction may decide to expand the number of judges elected at-large in a majority white district from one to six rather than divide that district into two smaller judicial election districts, one majority black and one majority white, and may do so with the stated discriminatory purpose of preventing the election of black judges. If the changes from one to six are implemented and not submitted, the Attorney General will have no way of reviewing the evidence of discrimination. If years later a seventh judgeship is added without discriminatory purpose and is submitted, the Attorney General will be confronted only with the change from six to seven. There will be no indication to the Attorney General that the evidence of discrimination surrounding the prior changes should be examined. Yet, under the district court's rule, the preclearance of the nondiscriminatory change from six to seven automatically would preclear the prior discriminatory changes. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither submitted nor in fact evaluated by him." *United States v. Board of Commissioners of Sheffield*, 435 U.S. at 136.

Indeed, in this case, the district court's rule automatically cleared prior changes that had little relationship to the subsequent changes actually considered and precleared by the Attorney General. For

instance, the district court held that preclearance of an act creating new Court of Appeal judgeships from smaller districts within circuits automatically precleared prior at-large circuitwide judgeships.[10] In that situation, the Attorney General never had the opportunity to evaluate the change caused by the earlier creation of judgeships elected at-large from the entire circuit. In the same vein, the district court held that the otherwise uncleared enactment of designated divisions (or posts) for the First Circuit was automatically cleared by the later approval of designated divisions in other circuits.[11] However, the Attorney General never had the opportunity to evaluate the impact of designated posts as applied to the specific situation in the First Circuit. In addition, the district court said certain changes were precleared when the only preclearance involved the Attorney General's approval of the holding of referendum elections proposing the changes.[12] This is in conflict with *United States v. Board of Commissioners of Sheffield*, 435 U.S. at 137, in which this Court said preclearance of a referendum election does not necessarily constitute approval of the underlying change proposed in the referendum.

The district court's rule would have broad and unsettling ramifications. It could well encourage jurisdictions not to submit discriminatory election changes for preclearance, comfortable in the knowledge that the measures later could be silently precleared through the submission of subsequent and more innocuous changes.

The district court's rule also would seriously hamper the Attorney General's discharge of his Section 5 responsibilities. With each submission of a voting change, the Attorney General would be required to go back and determine whether all prior changes in that voting district — no matter how many — had been submitted for preclearance. If some had not been precleared, examination of those changes would be necessary even though the covered jurisdiction had not submitted the prior changes. That would be too great a burden for the Attorney General, who already must review thousands of voting changes each year. Section 5 places upon the covered jurisdictions the responsibility of submitting to the Attorney General voting changes, and informing the Attorney General of the nature of those changes. *McCain v. Lybrand*, 465 U.S. at 249. The district court's decision reverses that principle, and is inconsistent with the structure and the efficient enforcement of the Act.

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[10] See n. 4 above and the accompanying text.

[11] See n. 3 above and the accompanying text.

[12] See notes 5-6 above and the accompanying text.

For all of these reasons, the district court's ruling on this point should be reversed.

III. THE ELECTIONS THAT DID OCCUR PURSUANT TO UNCLEARED CHANGES SHOULD BE SET ASIDE, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF ANY FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's errors, elections occurred that never should have occurred. Although this Court enjoined elections scheduled November 6 and December 8 for judgeships the district court held to be uncleared, candidates nevertheless were elected to some of those judgeships because they were unopposed or won on October 6 without the need for a November 6 runoff. In addition, the district court let elections go forward for those judgeships it deemed to have been cleared because of the preclearance of subsequent voting changes.

The question now is what should be done about those elections that the district court improperly allowed to occur. This Court's most recent case on the issue is *NAACP v. Hampton County Election Commission*, in which the Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. . . . If appellees fail to seek this approval, *or if approval is not forthcoming*, the results of the March, 1983 election *should be set aside*.

470 U.S. at 182-183 (emphasis added). In the present case, of course, the State long ago submitted the changes to the Attorney General for approval, and the Attorney General has objected and reiterated his objections upon reconsideration. The Attorney General's approval

has not been forthcoming, and under *Hampton County*, the elections should be set aside.

Certainly, the election results should not be left in place while the State seeks a declaratory judgment in the District of Columbia. That is exactly what the district court's order originally provided when it permitted the illegal elections to occur and the winners to serve "provisionally" pending litigation in the District of Columbia. Given that the district court's order was error in that respect, the district court should not be allowed to perpetuate the error. Litigation in the District of Columbia could take years. The State had an opportunity to initiate that litigation back when the Attorney General first interposed his objections in September of 1988, two years prior to the 1990 elections. The State did not do so, and as of the writing of this jurisdictional statement (mid-December of 1990), the State still has not filed an action in the District of Columbia. The State's dilatory tactics should not be permitted to delay the enforcement of Section 5.

Accordingly, this Court should order the district court to set aside the elections and the matter should be remanded to the district court to determine what further measures are necessary in light of the rights of black voters under Section 5 and the interests of the State in the smooth functioning of its justice system. For instance, the district court can consider in the first instance whether it is possible to hold new elections for the uncleared seats under an interim court-ordered plan that cures the Section 5 deficiencies and permits the judgeships to remain functional. *See, Hathorn v. Lovorn*, 457 U.S. at 270. In the meantime, of course, the State of Louisiana remains free to pass and preclear legislation that would cause these judges to be elected in a manner that satisfies Section 5.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, probable jurisdiction should be noted and the district court's decision should be reversed.

Respectfuily submitted,

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